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NO. 80-737

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ and EVA FLOYSTRUP,

Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OPPOSING MOTION TO DISMISS APPEAL

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ARGUMENT

I. THE MOTION TO DISMISS APPEAL IS WITHOUT MERIT: A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

This appeal presents substantial federal constitutional questions of first impression which require resolution by this Court. Appellees have filed a Motion to Dismiss Appeal on the ground that this case does not present such issues. Yet their Motion does not support or even address that point but argues only that the challenged section of the Berkeley ordinance [1] is constitutional. For that reason alone the Motion should be denied.

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[1] Berkeley, Cal., Berkeley Election Reform Act of 1974, Ordinance 4700-N.S. (June 4, 1974), Section 602.

Moreover, Appellees concede that the ordinance affects fundamental First Amendment rights of speech and association of large numbers of citizens. Motion to Dismiss Appeal, p. 5.

The issue on this appeal is whether there are imminently threatened compelling state interests which are protected by the ordinance so as to justify its admitted infringement of First Amendment rights and whether the ordinance is narrowly drawn to avoid unnecessary abridgement. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). There is no United States Supreme Court opinion which rules directly on this issue. To Appellants' knowledge this is the first opportunity for the Court to

decide this important constitutional question and resolve the direct conflict between the very recent opinions of the California Supreme Court and the United States Court of Appeals for the Fifth Circuit.

This Court has previously decided comparable questions of great import with respect to contributions to and expenditures by candidate campaign committees and corporate contributions and expenditures in ballot measure campaigns. The constitutional issue raised by this appeal is equally important and no less deserving of immediate and ultimate resolution by this Court. The rights of millions of citizens who use and rely on the initiative and referendum processes are now being

illegally restricted by widespread laws limiting contributions to ballot measure campaigns. This serious violation of First Amendment rights now mandates plenary consideration.

II. THERE IS A DIRECT CONFLICT BETWEEN OPINIONS OF THE CALIFORNIA SUPREME COURT AND UNITED STATES COURT OF APPEALS.

Appellees implicitly concede that the opinion of the California Supreme Court in this case is in direct conflict with the recent opinion of the United States Court of Appeals in *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980; United States Supreme Court Docket No. 80-969; Appendix to Jurisdictional Statement at A-89 (hereinafter "J.S.App.")),

when they recommend that if plenary review is granted in *McCrary*, it also be undertaken herein. Motion to Dismiss Appeal, p. 5. It is undeniable that the holdings in these opinions are in conflict. In both cases virtually identical governmental interests were advanced to justify the undisputed encroachment on citizens' First Amendment rights. In rejecting the applicability of the proposed governmental interests, the Fifth Circuit unequivocably concluded that "[b]ecause campaign contributions implicate important first amendment rights and because Florida has shown no sufficiently important interest to justify restricting the contributions in a referendum election, we affirm the district court decisions declaring

these statutory restrictions unconstitutional." 621 F.2d at 197; J.S.App. at A-99. The California Supreme Court concluded to the contrary that the challenged contribution "limit is constitutional because it serves compelling governmental interests without unduly infringing upon First Amendment rights." *Citizens Against Rent Control v. City of Berkeley*, 27 Cal.3d 819, 821, 614 P.2d 742, 743, 167 Cal.Rptr. 84, 85 (1980); J.S.App. at A-1.

In actuality, the Berkeley ordinance imposes even greater restrictions on First Amendment rights than the Florida law in that in Berkeley a person's or entity's total contributions in support of or in opposition to a ballot measure may not exceed two

hundred fifty dollars ($250). However, in Florida, a person or entity may apparently contribute the maximum amount ($3000 in state elections, $1000 in county elections) to as many committees as there are on a given side of a referendum issue in a single election (Florida Statutes § 106.08(1)).

The two appellate courts also came to diametrically opposed conclusions respecting the possibility of corruption of the political process by contributions to ballot measure committees:

> With regard to referendum elections, appellants cannot justify the statutory restrictions upon political contributions as a means for preventing corruption.

Let's Help Florida v. McCrary, 621 F.2d at 200, J.S.App at A-98.

> We conclude that the Berkeley ordinance . . . is designed to preserve initiative and referendum elections for the salutary purpose for which they were created, and tends to prevent the corruption of the political process that otherwise results.

Citizens Against Rent Control v. Berkeley, 27 Cal.3d at 830, 641 P.2d at 748, 167 Cal.Rptr. at 90, J.S.App. at A-15.

III. THE ORDINANCE DIRECTLY AND SUBSTANTIALLY AFFECTS FIRST AMENDMENT RIGHTS.

Appellees' reliance on *Buckley* dicta for the proposition that ballot measure contribution limitations only marginally restrict communication and First Amendment rights of speech and

association is misplaced.[2/] The language and analysis quoted by Appellees relates only to contributions to candidate campaigns. It does not pertain to ballot measure elections which were not at issue in *Buckley*. While contributions to candidate campaigns may involve "speech by someone other than the contributor" because such speech is made by the

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2/ Contrary to the implications of statements in the Motion to Dismiss Appeal, the record below demonstrates with uncontradicted evidence that exercise of Appellants' First Amendment rights was impaired by the ordinance and that CARC's ability to carry on an effective campaign would have been harmed if the Superior Court had not issued a temporary restraining order enjoining enforcement of the Ordinance.

candidate, individuals who contribute to political committees which support or oppose ballot measures necessarily speak directly through such committees.

In *Common Cause v. Harrison Schmitt*, [1980] Fed. Election Campaign Financing Guide (CCH) ¶9138 (___F.Supp. ___, CA No. 80-1609) (D.D.C. Sept. 30, 1980) the court invalidated limitations on expenditures by political committees independent of a presidential candidate as violative of the First Amendment. Although that opinion is not dispositive of the issue at bench, it is instructive with respect to the relationship between a contributor and a candidate (including the

candidate's committee), as contrasted with a contributor and a ballot measure committee. "[S]peech promulgated through a political committee bears a different relation to its constituent contributors than does a candidate's speech to his or her constituent supporters (or, contributors to the non-publicly funded candidate)." *Common Cause*, Campaign Financing Guide at 51.073. Candidates may or may not express the sentiments of their contributors on specific issues; "[p]olitical committees, on the other hand, are bound to reify the political thoughts of their member contributors." *Id.* "The communication sponsored by the political committees is the language of their members and contributors

because the contributions are made based on an understanding and community of political interest among all of the contributors and their political committees. . . . These contributors express themselves through political committees." *Id.*; see also *Buckley v. Valeo*, 424 U.S. at 19. The Berkeley ordinance significantly and directly affects the ability of contributors to ballot measure committees to associate and to express themselves.

IV. THERE IS NO GOVERNMENTAL INTEREST SUFFICIENTLY COMPELLING TO JUSTIFY THE ORDINANCE'S INFRINGEMENT OF CONSTITUTIONAL RIGHTS.

Both the record below and case law are devoid of factual and legal support for the following governmental interests asserted by

Appellees and the Court below as justification for the Ordinance: "to preserve the integrity of the initiative and referendum"; "to sustain the active alert responsibility of the individual citizen in a democracy for the wise conduct of government"; and "to broaden public participation in the initiative process." Motion to Dismiss Appeal, pages 10-13.

Appellees do not dispute the fact that the record below contains no evidence whatsoever that any of these interests are furthered by the ordinance. Nor is there any proof that absent such contribution limitations there would be any imminent danger to the initiative or democratic processes. There is no established, likely or logical nexus between

these interests and application of the ordinance. Thus contrary to the conclusion of the simple majority of the California Supreme Court, the city failed in its burden to establish any compelling governmental interest.

In reality, Appellees' and the California Supreme Court's position is that advocacy may be suppressed merely because it may influence voters. Of course, such assertion is contrary to the express holdings of this Court. *Buckley v. Valeo*, 424 U.S. at 48-49; *First National Bank of Boston v. Bellotti*, 435 U.S. at 790. It is not permissible to restrain campaigning merely because it is effective or to suppress thorough exposure and discussion of issues which may inform

and influence voters. The actual "justification" for the ordinance is an "interest" which is plainly contradictory to the First Amendment.

In conclusion, this case involves important issues of first impression respecting the fundamental rights of citizens to participate in the electoral process. It is respectfully submitted that Appellees' Motion to Dismiss Appeal be denied.

Respectfully submitted,

DATED: January 27, 1981.

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